

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF REVENUE

In the Matter of the Issuance of a Tax
Clearance Certificate to:

Thomas E. Donnelly
Donnelly Stucco Co.
2519 East 25th Street
Minneapolis, Minnesota 55406

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FINDINGS OF FACT,
CONCLUSIONS
AND RECOMMENDATION

Minnesota I.D. No. 5189039
Minnesota Taxpayer I.D. No. 472-44-4108

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on August 22, 1996, at the Office of Administrative Hearings in Minneapolis, Minnesota. The record closed on September 23, 1996, upon receipt of the Respondent's final post-hearing submission.

Linda J. Geier, Attorney, Minnesota Department of Revenue, Appeals and Legal Services Division, 10 River Park Plaza, St. Paul, Minnesota 55146, appeared on behalf of the Minnesota Department of Revenue. Thomas E. Donnelly, accompanied by his wife, Muriel A. Donnelly, appeared on behalf of the Respondents, Thomas E. Donnelly and Donnelly Stucco Co., 2519 East 25th Street, Minneapolis, Minnesota 55406, without benefit of counsel.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Matthew Smith, Commissioner, 10 River Park Plaza, St. Paul, Minnesota 55146, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this matter is whether the Respondents owe \$500.00 or more in delinquent taxes, penalties, or interest, thereby requiring the denial of the issuance of a tax clearance certificate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Thomas E. Donnelly and Muriel A. Donnelly have been involved in the operation of several businesses in Minnesota, including Donnelly Stucco Co., Great Lakes Products, Inc., and Donnelly Windows, Inc. The Donnellys have entered into payment agreements with the Department of Revenue in which they have admitted that these companies and they individually are liable for the payment of certain unpaid withholding taxes, plus penalties, interests, and other costs. The Donnellys have paid the Department all of the tax liability that they owe regarding Great Lakes Products, Inc., and Donnelly Windows, Inc. The tax liability with respect to Donnelly Stucco Co. has not yet been satisfied.

2. Thomas E. Donnelly has applied to the Minnesota Department of Commerce for a building contractor license. Mr. Donnelly is seeking to obtain a license because an employee of Donnelly Stucco Co. who held a building contractor license has left the Company and a license is required for the Company to continue to operate. The Department of Revenue is holding up the issuance of Mr. Donnelly's license by refusing to issue a tax clearance certificate to the Department of Commerce.

3. The Department informed Mr. Donnelly in a notice dated April 20, 1996, that the Department of Commerce would not issue or renew or transfer the building contractor license until the Department of Revenue issued a clearance certificate, and indicated that the clearance certificate would be issued when the amount of unpaid taxes plus accrued interest relating to Donnelly Stucco Co. was paid and any returns becoming due prior to the date of payment were filed and fully paid. The notice issued by the Department of Revenue informed Mr. Donnelly of its right to request a contested case hearing before the Office of Administrative Hearings. (Ex. 3.)

4. Mr. Donnelly requested a contested case hearing in a letter dated May 20, 1996. (Ex. 3.)

5. According to Department records, Donnelly Stucco Co. and the Donnellys were liable for \$12,313.39 in principal, interest, and penalties stemming from unpaid withholding taxes owed by Donnelly Stucco Co. as of the date of the hearing. As mentioned above, Mr. and Mrs. Donnelly have been assessed individually for the amount owing from Donnelly Stucco Co. The liability is based on withholding taxes due for the periods of December, 1993, March, 1994 and June, 1994. (Exs. 1 and 2.)

6. Mr. and Mrs. Donnelly did not dispute the amount or fact of the tax liability at the hearing in this matter or provide any evidence that there is a pending administrative or court proceeding contesting the alleged tax liability. In the Donnellys' second payment agreement with the Department, the Donnellys acknowledged that they owed the Department \$13,241.43 in unpaid withholding, penalty and interest as of July 24, 1996, and confessed judgment in that amount. (Ex. 2.)

7. Mr. and Mrs. Donnelly have entered into two separate payment agreements with the Department pertaining to the tax liability for Donnelly Stucco Co. The first payment plan was effective from June 1, 1995, and called for monthly payments of \$1,000.00 and a final balloon payment of \$16,000.00 due on May 1, 1996. At the time that the Donnellys entered into this first payment agreement they owed the Department almost \$27,000.00 in unpaid withholding tax. (Ex. 5.)

8. The Donnellys were late in submitting the first few payments under the first payment agreement. Their next two checks did not clear the bank and had to be reissued. Sometime during the spring of 1996, the Donnellys were threatened with foreclosure proceedings on their house and missed two payments due under the first payment agreement in the total amount of \$2,000.00. The Donnellys also did not pay the final balloon payment of \$16,000.00 that was due on May 1, 1996. The Donnellys or their representative contacted the Department prior to the due date of the balloon payment and attempted to renegotiate the agreement, but that was not accomplished. The Donnellys continued to make payments to the Department between the time that the first payment agreement lapsed and the time that the second payment agreement took effect. They paid the Department a total of \$3,000.00 between May 28, 1996, and July 19, 1996. (Ex. 5 and Respondents' Sept. 23, 1996, submission.)

9. The Donnellys have now negotiated a second payment agreement with the Department. The second payment agreement took effect in early August, 1996, just prior to the hearing in this matter, and provides for monthly payments to be made by electronic transfer. The second payment agreement specifies that "[e]ntering this Agreement will not cause the issuance of tax clearance certificate to any licensing authority under Minn. Stat. § 270.72." (Ex. 2.)

10. The Donnellys paid the Department \$1,000.00 on or about August 20, 1996, and \$1,000.00 on or about September 18, 1996, and thus are current in their payments under the second payment agreement. (Department's Sept. 11, 1996, submission and Respondents' Sept. 23, 1996, submission.)

11. On or about September 6, 1996, Mr. Donnelly was informed that Riverside Bank had denied his application for a \$14,000.00 unsecured loan because it determined that his income was insufficient for the amount requested. (Respondents' Sept. 6, 1996, submission.)

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Revenue and the Administrative Law Judge have jurisdiction in this case pursuant to Minn. Stat. §§ 14.50 and 270.72.

2. The Department gave proper notice of the hearing in this matter and has fulfilled all other relevant, substantive and procedural requirements of law and rule.

3. Minn. Stat. § 270.72, subd. 1 (1994), provides in pertinent part as follows:

Subdivision 1. Tax clearance required. The state or a political subdivision of the state may not issue, transfer, or renew, and must revoke, a license for the conduct of a profession, occupation, trade, or business, if the commissioner notifies the licensing authority that the applicant owes the state delinquent taxes, penalties, or interest. The commissioner may not notify the licensing authority unless the applicant taxpayer owes \$500 or more in delinquent taxes or has not filed returns. . . . A licensing authority that has received a notice from the commissioner may issue, transfer, renew, or not revoke the applicant's license only if (a) the commissioner issues a tax clearance certificate and (b) the commissioner or the applicant forwards a copy of the clearance to the authority. The commissioner may issue a clearance certificate only if the applicant does not owe the state any uncontested delinquent taxes, penalties, or interest and has filed all required returns.

Minn. Stat. § 270.72, subd. 2(b) (1994), provides that the term "delinquent taxes" does not include a tax liability if "(i) an administrative or court action which contests the amount or validity of the liability has been filed or served, (ii) the appeal period to contest the tax liability has not expired, or (iii) the applicant has entered into a payment agreement and is current with the payments." (Emphasis added.)

4. The Donnellys have entered into two payment agreements with the Department. They did not remain current at all times with their payments under the first payment agreement. They entered into a new payment agreement just prior to the hearing in this matter, however, and they are current with their payments under that agreement. Accordingly, they do not owe "delinquent taxes" within the meaning of Minn. Stat. § 270.72, subd. 2(b) (1994), and the Department may not properly continue to deny the issuance of a tax clearance certificate pursuant to Minn. Stat. § 270.72, subs. 1 and 2 (1994).

5. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED: that the Commissioner of Revenue issue a tax clearance certificate to the Department of Commerce on behalf of Thomas E. Donnelly.

Dated this 18th day of October, 1996.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Taped (not transcribed) (one tape)

NOTICE

Under to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Pursuant to Minn. Stat. § 270.72, subd. 1 (1994), the Commissioner of Revenue "may issue a tax clearance certificate only if the applicant does not owe the state any uncontested delinquent taxes, penalties, or interest" in the amount of \$500.00 or more. Minn. Stat. § 270.72, subd. 2 (1994), provides that the term "delinquent taxes" does not include a tax liability if "the applicant has entered into a payment agreement and is current with the payments."

It appears that the Donnellys have made good faith efforts to meet their obligations and pay the tax liabilities that they owe. They have paid off the tax liability for two of the companies in which they are involved, they have made payments even when no formal payment agreement was in place, and they have steadily decreased the amount of the tax liability owed by Donnelly Stucco. Unfortunately, due to a variety of circumstances, they were unable to remain current with the payments under the first payment agreement pertaining to Donnelly Stucco. They failed to make a total of \$18,000.00 in payments required under that agreement (\$2,000.00 in monthly payments and the \$16,000.00 balloon payment). It thus is evident that the Donnellys were not current with their payments under the first payment agreement, and that the Department was justified in withholding issuance of the clearance certificate during the spring and early summer of this year.

The first payment agreement has expired, and a second payment agreement has now been negotiated. The second agreement took effect just prior to the date of the hearing, and requires that payments be made by electronic transfer on the 20th of each month. As a result, the Department was not in a position to know at the time of the hearing whether the transfer had in fact been made. The Administrative Law Judge requested that the Department provide

such information following the conclusion of the hearing, and afforded the Donnellys an opportunity to respond.

The Department acknowledged in its September 16, 1996, submission that the Donnellys in fact made their first payment under the second payment agreement in August, as required. In addition, the Department did not dispute the assertion made by the Donnellys in their September 23, 1996, post-hearing submission that they had also made a timely payment in September. Accordingly, based upon the information submitted by the parties, it is evident that the Donnellys must be deemed to be "current" with their payments under the second payment agreement. For that reason, the Donnellys do not owe "delinquent taxes" as defined in Minn. Stat. § 270.72, subd. 2, and should not have a clearance certificate denied on that basis.

The Administrative Law Judge does not find persuasive the Department's argument that the Donnellys, "by agreeing to the payment plan as written, waived any application of Minn. Stat. § 270.72." Department's September 16, 1996, submission at 2. There is no evidence in the record of this proceeding that the Donnellys were ever asked to waive the statute or did so in a knowing and voluntary way. The second payment agreement itself does not contain any express waiver of the statutory definition of "delinquent taxes." It merely provides that "[e]ntering this Agreement will not cause the issuance of a tax clearance certificate to any licensing authority under Minnesota Statute 270.72." Ex. 2, ¶ 1. This provision will not be violated if Minn. Stat. § 270.72 is applied in the manner recommended here, since it is not the Donnellys' mere entry into the payment agreement that causes the issuance of a clearance certificate but rather the rendering of timely payments by the Donnellys in accordance with the agreement. Because the language of the contract itself is not ambiguous, there is no basis for resorting to extrinsic evidence about the parties' discussions to construe its provisions.

Moreover, even if the Donnellys were told at the time that they entered into the second payment agreement that it was Department policy to require entry into a secured payment agreement to obtain issuance of a tax clearance certificate, that does not necessarily mean that the clearance certificate would not be issued in the event that the Donnellys made timely payments under an unsecured agreement. There is no rule or statute to the knowledge of the Administrative Law Judge that permits the Department to require taxpayers entering into payment agreements to put up collateral as security or obtain an assurance of payment by a third party as a precondition to issuance of a tax clearance certificate, regardless of whether they make timely payments under an unsecured agreement. To the contrary, Minn. Stat. § 270.72 makes it clear that a taxpayer who has entered into a payment agreement and is current in his or her payments under that agreement cannot be deemed to owe "delinquent" taxes and thus may not have a clearance certificate withheld. This statutory provision must prevail over any conflicting Departmental policy.

Accordingly, the Administrative Law Judge has recommended that the tax clearance certificate be issued.

B.L.N.